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IN THE

Supreme Court of the United States

No. 667

OCTOBER TERM, 1939

JOHN CARLSON, *Appellant*

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

Appeal from Superior Court of Shasta County, State of California

BRIEF FOR THE APPELLANT

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THE CORNELIUS PRINTING COMPANY

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OPINIONS BELOW

The opinion below is not reported, but is printed in the transcript of the record, together with the opinion in a related case (R. 72-73).

JURISDICTION

The jurisdiction of this Court rests on Section 237 (a) of the Judicial Code, as amended by the Acts of February 13, 1925, January 31, 1928, and April 26, 1928. The appellant, John Carlson, was convicted in the Justice's Court of Township Number Nine, Shasta County, California, for a violation of a county ordinance and was sentenced to imprisonment for twelve days in default of payment of a fine of twenty-five dollars. The judgment was affirmed by the Superior Court of Shasta

County from which there is no further appeal allowed in the state courts. The case comes here on appeal.

QUESTIONS PRESENTED

(1) Whether the Anti-Picketing ordinance of Shasta County on its face and as construed and applied to the appellant is valid and constitutional;

(2) Whether the Superior Court of Shasta County erred in its decision and judgment in that it failed to rule or decide that the ordinance, under which the appellant was charged and for violation of which he was convicted, was and is unconstitutional.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

The statute involved in this case is the Anti-Picketing ordinance of Shasta County, adopted on April 4th, 1938, by the Board of Supervisors of said County. The complete text of the ordinance is set forth in the Record (Ex. "A," R. 68A). Those portions of the ordinance under which the appellant was charged and for violation of which he was convicted are as follows:

> "Section 2. It shall be unlawful for any person, in or upon any public street, highway, sidewalk, alley or other public place in the County of Shasta, State of California, to loiter in front of, or in the vicinity of, or to picket in front of, or in the vicinity of, or to carry, show or display any banner, transparency, badge or sign in front of, or in the vicinity of, any works, or factory, or any place of business or employment, for the purpose of inducing or influencing, or attempting to induce or influence . . . any person to refrain from doing or performing any service or labor in any works, factory, place of business or employment. . . ."

The provision of the Constitution involved is the Fourteenth Amendment of the Constitution of the United States and particularly Section 1 thereof.

STATEMENT

The proceedings in this case were instituted upon a criminal complaint filed on February 24th, 1939, charging the appellant and 29 other persons of having violated the Anti-Picketing ordinance (R. 1-2).

The accused were held on $100 bail and were committed in default of bail. The appellant was not released until March 2, 1939, on his own recognizance (R. 19).

A motion for separate trials was granted and the trial of the appellant was commenced on April 11th, 1939, before the Honorable Marie C. Mahon, the Justice's Court of Township Number Nine, County of Shasta (R. 20-21). The trial was continued to April 28th, 1939, when it was concluded and the court imposed judgment sentencing the appellant to pay a fine of twenty-five dollars, or twelve days in jail in lieu of the fine (R. 67).

The judgment was appealed and the appeal affirmed on November 14th, 1939, by the Superior Court of California for Shasta County (R. 72-73). The evidence at the hearing comes from the testimony of three persons, together with certain exhibits.

The prosecution offered only one witness, Alvin M. Cibula, the Assistant District Attorney of Shasta County. The defense, in addition to the appellant himself, had two witnesses: John Morgan and John Weise.

The facts are not in dispute since the appellant is ready to stand by the evidence put in by the prosecution

and the testimony of the defense was in no wise contradicted or rebutted.

The manner in which the picketing was carried on is described in the testimony of the prosecution's witness, Cibula. The circumstances of the labor dispute and the purpose of the picketing are described in the testimony of the defense witnesses. This evidence showed as follows:

Cibula testified that on the morning of February 24th, 1939, he went out to the Delta Tunnel project, which is located approximately 32 miles north of Redding (R. 22). The project was a construction job conducted by the United Concrete Pipe Corporation (hereinafter referred to as the Company) under contract with the United States Bureau of Reclamation, for the purpose of building a tunnel to relocate the lines of the South Pacific Railroad (R. 22, 34).

On that day the preliminary work was being done of clearing away brush and construction of wooden camps for the housing of the workers.

A main public highway known as U. S. Highway 99 runs near the project bearing generally north and south. The highway consists of a public right-of-way approximately 80 feet in width with a paved portion of 20 to 21 feet wide, and a gravelled portion 30 feet on each side of the paved road. The project was located east of the highway and fenced in by a wooden fence running parallel to the highway and located 50 to 100 feet from the easterly line of the paved part of the highway (R. 22-23).

When Cibula reached this spot about 7:15 A. M., workers were going through the gate and into the project grounds. At approximately 7:30 A. M. a group of 29

men in 5 or 6 automobiles came from the general direction of Redding, parked their cars on the gravelled portion of the highway which was not being used, got out of their cars, and started picketing. The picketing took place along the easterly line of the paved portion of the highway in the vicinity and in front of the Delta Tunnel project (R. 23).

The picketing, according to the prosecution's only witness, was carried out in the following manner:

The pickets walked by twos 5 or 6 feet apart for a distance of 50 to 100 feet north and south. All of the walking in connection with the picketing by the defendant and the others was done off the paved portion of the highway and on the gravelled portion of the road which is public property.

Some of the pickets were carrying signs so that they could be seen both by workers on the job and any person who might be going along on the highway in either direction (R. 25). The signs read as follows:

"Don't Be a Scab" (Exhibit b1, R. 68B);

"Shasta County Construction Workers Local 260" (Exhibit b2, R. 68C);

"CIO Picket Line" (Exhibit b3, R. 68D);

"This Job Unfair to CIO" (Exhibit b4, R. 68E).

When the picketing started there were some men working on the job and others arrived after the picketing started. Throughout the picketing there was continuous traffic on the highway (R. 25).

Upon cross-examination, Cibula testified (R. 26-28):

That the pickets were at all times peaceful;

Appellant John Carlson did not make any loud or any other noises;

He did not commit any disturbance of the peace;

He did not trespass on private property;

He did not threaten or intimidate or coerce any one;

He did not carry or possess any weapons;

He did not obstruct the traffic of persons and automobiles along the paved portion of the highway or anywhere else;

He was peaceable and orderly;

He did not commit any violence;

He did not molest or annoy anyone;

He did not riot or disturb the peace at any time during his picketing;

Neither he nor any of his associates molested or interfered physically otherwise with any person who wished to go or leave the job;

All of his conduct was simply for the purpose of persuading the workers to leave their jobs;

During the picketing persons and vehicles passed freely from the highway through the picket line to the project.

The description of the manner in which the picketing was carried out is confirmed by the testimony of Carlson himself and by one of his co-pickets, John Weise, and by an officer of the union of which Carlson was a member, John Morgan. These men brought out in more detail the circumstances of the dispute with the company which led to the peaceful picketing.

Carlson testified that he was a miner engaged in mining, quarry and trap tunnel work since 1923 and that he was a resident of Redding, California. Together with some 28 other men he had been hired on January 26 or

27th by the superintendent of the project (R. 30). Shortly after the construction job began, one Green, an organizer for the American Federation of Labor, came on to the job, talked to all of the miners in the presence of company foremen and on company time, and passed out buttons bearing the legend: "I am a member of the AFL" (R. 30-31).

As a result, when the work was shut down on February 2nd, 1939, because of weather conditions, the men discussed the question among themselves in groups of 7 to 10 during the noon hour and decided to join a union of their own choosing. The majority of them at one time or another had been members of the International Union of Mine, Mill and Smelter Workers, affiliated with the Congress of Industrial Organizations, hereinafter referred to as the Union (R. 30-31).[1]

The men decided that they would take a vote among themselves and as a result of the vote, 22 voted in favor of the Union, 5 did not vote at all, and 2 men, one an engineer and the other a truck driver, carried AFL cards. Thus there was a vote of 22 to 2, out of 29 employees on the job in favor of the Union. The men thereupon joined Local 260 of the Union (R. 32).

A committee of the Union requested the Company to bargain. The Company refused (R. 32).

The governor of California, through his executive secretary, called a conference of the Company and the Union at Sacramento and persuaded the Company to suspend operations in the meantime. The Company refused to change its position or negotiate in any way so

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[1] The Union has a special organizing committee called the Tunnel Construction Workers Organizing Committee engaged primarily in organizing tunnel construction workers. This work is of the same nature as hard rock mining for which its members are specially qualified. (R. 44)

that the negotiations for arbitration fell through (R. 39-40).

When the work was reopened on February 23rd, none of the men were called back to work. Instead, the Company hired a new set of men requiring them to belong to the AFL and each of the original men on the job was notified that he could come back to work only if he too joined the AFL. The men refused and instead commenced picketing. At the same time the Union filed charges and amended charges with the regional office of the National Labor Relations Board against the Company on the ground that the Company refused to bargain with the majority representative of its employees and had locked out the employees because they joined the Union (R. 33; Defendant's Exhibit 1 and 2, R. 69-71).

Carlson himself stated that he did not intimidate or coerce, commit any violent or disorderly act, or make any gesture or threat of intimidation, use any lewd, insulting or abusive language, carry any weapons, obstruct any persons or trucks going to or from the job; that the purpose of his picketing was to induce the men who were working on the job to leave it, to induce others who might be coming out to get a job to refuse it, and to give publicity to the fact that the Delta Tunnel project was unfair to organized labor (R. 36-37).

He further testified that the use of the banners was for the same purpose of persuasion and publicity, and that the pickets were on the gravelled portion of the highway and did not interfere with any traffic which moved on the paved portion. He himself was carrying the sign bearing the words:

"This Job Unfair to CIO" (R. 38; Ex. b4, 68E).

The witness John Weise was a co-worker of the appellant and Secretary of the Union, in charge of its books and records. His testimony affirmed that of Carlson to the effect that 19 or 20 of the men had signed applications for membership in the Union and designated it as their exclusive bargaining agency (R. 43).

Weise, upon recall to the stand, also testified that he knew of two instances of the actual effect of the picketing. In one case, a man who had been working on the job quit because of the peaceful picketing; and in the other, a man who was looking for work on the project, upon seeing the picket line and its signs decided not to take work on the project (R. 65).

John Morgan, the last witness for the defense, is an international representative of the Union.[2] He stated that in his official capacity, after the men had signed up in the Union, he talked over the telephone with Mr. Bell, the treasurer of the Company, and asked him to meet the Union Committee. Mr. Bell refused to do so, stating that he was going to deal with the AFL, and the fact that the men had freely chosen the Union made no difference to him (R. 44-46).

Morgan further testified that on subsequent occasions, the Union repeated its request for collective bargaining and was always turned down. As a consequence several union meetings were held prior to February 23rd, the date the work on the project was reopened. Discussion took place as to whether the picket line should be established, and it was decided to do so for the purpose of peacefully persuading the men on the job to quit

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[2] The term "International" is a usage of American labor unions indicating that the union has branches in Canada.

work and to notify the public that the job was unfair to the Union (R. 46-47).

Morgan explained in detailed the reasons why unions engage in picketing as the one peaceful method available to them to give publicity to the facts of their side of the controversy with an employer (R. 48-59).

In summary, Morgan's testimony pointed out that placards, picket lines and distribution of leaflets are the only practical methods open to unions to notify the public at large and to notify men who otherwise might become strikebreakers. He stated that he knew as a matter of his experience among workers that they will not scab on a job because it means practically "stealing the bread out of another worker's mouth"; that because of the expense involved in hiring halls and running advertisements in the newspapers and gaining time on the radio, unions are prevented from using the usual channels of communicating their facts to the public and to other workers. He said it was necessary to let the public know the facts because public opinion is important; that the employer is sometimes able to whip up so-called vigilante committees to support back-to-work movements; that the picket line serves as a necessary stimulant to the morale of the men giving them activity instead of the forced idleness brought on them by the strike and that it serves as an outlet for the feelings of the men and as the best safeguard against violence since they then have an opportunity to express themselves in a peaceful way.

It was further brought out on cross-examination of Morgan that the Union had been unable to secure any halls in the vicinity; that it did not have enough money to pay for advertisements or get radio time; and that the employer had been making full use of the local

newspapers; that these indictments of the men for picketing had been joined with indictments for conspiracies to violate the Anti-Picketing law and thereby making it a felony, forcing the picketing to cease and allowing the employer to win the strike (R. 56-63).

He pointed out further that the purpose of the picketing was necessary to inflict economic pressure upon the employer to compel him to deal with the men and that the fundamental issue at stake in this strike was the question of recognition of the Union, so that the men could go on to discuss wages, hours and working conditions and establish grievance and arbitration machinery to prevent strikes and shutdowns (R. 63-65).

SUMMARY OF ARGUMENT

I.

Peaceful picketing in public streets and places during a labor dispute over terms and conditions of employment and representation for purposes of collective bargaining is an exercise of civil liberties protected by the Constitution.

A. The act of peaceful picketing is an expression of opinion and the dissemination of information concerning a labor dispute. Upon the uncontroverted evidence, the picketing engaged in by the appellant consisted simply in walking back and forth upon a public highway in a peaceable manner, not interfering with any one, and bearing a placard which carried the words: "This Job Unfair to CIO."

B. The interest and motive behind the picketing was to improve the conditions of workers through collective bargaining and other concerted action for their mutual aid and protection. The record is clear that the picket-

ing in this case was for the purpose of obtaining recognition of the Union chosen by an overwhelming majority of the men; then to negotiate a contract for wages, hours and working conditions. The picketing was engaged in after the men had been locked out by the employer.

C. The effect or purpose of the picketing was to induce others to quit or to refrain from taking employment with the company, to win the support of the public and generally to publicize the Union's side of the dispute.

D. The act of peaceful picketing is therefore the exercise of the fundamental rights of freedom of speech, press and assembly. This proposition is based upon three grounds:

(1) Judicial decisions have specifically held that peaceful picketing is an exercise of civil liberties;

(2) Peaceful picketing has been specifically affirmed by public policy and approved by this Court;

(3) The act of picketing comes within the general definition of freedom of expression as laid down by this court.

It is settled beyond dispute that the Fourteenth Amendment, and particularly Section 1 thereof, protects the exercise of these rights against any abridgment by a state or municipal ordinance.

II.

The ordinance on its face and as construed and applied abridges fundamental civil liberties.

A. The ordinance makes picketing in whatever manner it is carried on unlawful and subject to criminal procedures and penalties. The ordinance thus operates

as a previous restraint upon the exercise of freedom of expression.

B. No substantial reasons can be advanced to support the validity of the ordinance.

1. The ordinance unlawfully prohibits peaceful picketing which in no manner can be held to be inconsistent with the maintenance of public comfort and convenience or with the preservation of the public peace. It violates each one of the requirements laid down by this Court to support valid regulations of the use of streets and public places for the exercise of civil liberties.

2. The ordinance unlawfully prohibits peaceful picketing which in no manner can be held to be obscene or offensive to public morals or advocating unlawful conduct. Both upon its face and as construed and applied, the ordinance violates the tests laid down by this Court for determining whether the legislative power may be used to prohibit picketing because of its unlawful nature.

The tests laid down by this Court are twofold and the ordinance fails to meet either of the tests.

(a) Publicizing the facts of a labor dispute does not advocate any unlawful means nor does it involve any clear or present danger of bringing about a substantive evil. It is simply unreasonable and arbitrary to suppose, as the ordinance alleges, that the use of picketing to induce men to quit work could directly result in a serious injury to the State. It is equally unreasonable and arbitrary to declare, as does the ordinance on its face, that the aim of unions to enroll members in Shasta County is a substantive evil which the County may prevent. To suppress the peaceful exercise of constitutional rights in order to prevent violence by others would reduce constitutional protection to a mere form of words.

(b) Publicizing the facts of a labor dispute is not a malicious or willful interference with the rights of others without any legal justification. It is by now fundamentally recognized that workers do have a legal interest in terms and conditions of employment and representation for purposes of collective bargaining to justify their exercise of constitutional rights. The ordinance can be declared valid as a protection of the rights of others against picketing only upon the ground that the exercise of fundamental civil liberties by workers is illegal because it results in an injury to the employer's property and business.

C. The ordinance is invalid because it is altogether vague and indefinite. It is not necessary to consider whether any part of the ordinance is inseparable from the rest because no part of it is free from this taint of illegality.

D. The ordinance denies the equal protection of the laws. It is a piece of crass and gross discrimination denying to workers the ordinary rights enjoyed by the employer.

ARGUMENT

I. PEACEFUL PICKETING ON PUBLIC STREETS AND PLACES DURING A LABOR DISPUTE OVER TERMS AND CONDITIONS OF EMPLOYMENT AND REPRESENTATION FOR PURPOSES OF COLLECTIVE BARGAINING IS AN EXERCISE OF CIVIL LIBERTIES PROTECTED BY THE CONSTITUTION.

The basic question in this case is whether the constitutional rights of the appellant have been denied. Upon this question depends the jurisdiction of this Court and

the decision it may make with respect to the validity of the challenged ordinance. It therefore becomes necessary to determine whether any Federal right is involved.

This determination can be made by answering the question whether the appellant was exercising any such right. It is our contention that there is only one answer which can be given to this question. The appellant was engaged in picketing. We can look to the ordinance and evidence in the case to define picketing.

A. The act of peaceful picketing is an expression of opinion and the dissemination of information concerning a labor dispute.

Upon the uncontroverted evidence, the picketing engaged in by the appellant consisted simply in walking back and forth upon the public highway in a peaceable manner, not interfering with anyone, and bearing a placard which carried the words: "This Job Unfair to CIO."

The ordinance defines picketing to be

> "in or upon any public street, highway, sidewalk, alley or other public place in the County of Shasta, State of California, to loiter in front of, or in the vicinity of, or to picket in front of or in the vicinity of, or to carry, show or display any banner, transparency, badge, or sign in front of, or in the vicinity of any works or factory or any place of business or employment" (Ex. A, R. 68A).

The witness for the prosecution described the picketing in this case as follows:

> "The picketing consisted of walking a distance of 50 to 100 feet in a general northerly direction, then turning around and retracing steps and con-

> tinuing as before . . . off the paved portion of the highway and on the gravelled portion of the right-of-way, that is, on public property . . . carrying signs that could be seen from all angles at some time or other . . . in a peaceable and orderly manner" (R. 23, 24, 26).

The picketing was defined by the appellant himself as follows:

> "It consisted simply of walking back and forth along the side of the paved portion of the highway . . . carrying a sign . . . about being unfair to the CIO. . . ." (R. 37-38).

Thus the bare physical description of what the men were doing is not in dispute. For the purposes of the ordinance in general and the facts of this case in particular, there is no question as to just what the act of picketing involved.

B. The interest and motive behind the picketing was to improve the condition of workers through collective bargaining and other concerted action for their mutual aid and protection.

The record is clear that the picketing in this case arose out of a bona fide labor dispute. Stripping the declaration of the ordinance of its characterizations, it alleges that picketing results from "disputes and differences between employers of labor, their employees, organized labor and between different groups and factions of employees." The ordinance further states that "one of the means now being employed by said unions" in their efforts to secure members "is the picketing of places of business in the County of Shasta" (Ex. A, R. 68A).

The evidence at the trial is indisputable that the appellant and his co-workers took to picketing because they wished to promote their attempt to secure collective bargaining in their work. Carlson testified upon cross-examination:

> "Q. . . . Wasn't it (the project) shut down because there was a dispute between the AFL and the CIO over the jurisdiction on that job, is that right?
>
> "A. Well, you see, the men who voted CIO never got back on our jobs, the company claimed it would only take men from the AFL. But that was after we took the vote. After we voted CIO, we were not allowed to work there any more. We were locked out of the job. Then the contractor arranged to have AFL men on the job, and the Governor got the contractor to remain shut down, but the arbitration fell through. So when the contractor opened up again with different men, not letting us have our jobs, why then we put the picket line on" (R. 40).

Morgan testified upon cross-examination:

> "Q. Were not the members of your Union, that is the twenty or twenty-two men that were dismissed as the record shows, were not they picketing for the purpose of having the United Concrete Pipe Corporation hire them back and recognize them and the Local Union 260 as the bargaining agent for all employees on the United Concrete job?
>
> "A. Yes. Local 260 and the men who were picketing, as I stated, did this for the purpose of first obtaining recognition of their union to represent them, and second and pursuant to this, negotiating a contract for wages, hours and conditions, at which time these men would return to work with union recognition and under union wages, union hours and union conditions" (R. 63).

C. The effect or purpose of the picketing was to induce others to quit or to refrain from taking employment with the company, to win the support of the public and generally to publicize the Union's side of the dispute.

The immediate purpose of the appellant and his coworkers is likewise beyond dispute. The ordinance itself defines the picketing which is prohibited as being "picketing for the purpose of inducing and influencing persons to refrain from doing or performing any service or labor in any place of employment or for the purpose of inducing or influencing any person to refrain from purchasing or using any goods or other articles manufactured therein."

The testimony again is clear as to these purposes of the picketing. The witness for the prosecution testified as follows:

> "Q. All of Carlson's conduct that fell under your observation was considered by you to be for the purpose of persuading the AFL workers to leave their jobs?
>
> "A. That was the impression that I gained" (R. 27).

Morgan testified:

> ". . . it was the intention of the Union to establish a peaceful picket line on the Delta project, and the purpose of the picket line was this. A two-fold purpose. First, by means of a peaceful picket line to advertise and show to the men that the Company had put to work on the job and who were therefore in a position of being strikebreakers, to advertise to them the fact that the job was unfair, and endeavoring in this manner to peacefully persuade these men not to work on that job. And the second purpose was to advertise the conditions of this

particular job to the public at large, to the American Federation of Labor people in general throughout the community, to the citizens generally of Shasta County, and in fact to the people of California generally, and specifically to the State administration" (R. 47).

D. The act of peaceful picketing is therefore the exercise of the fundamental rights of freedom of speech, press and assembly.

It seems to us indisputable as a matter of law that the act of picketing or the conduct of the appellant in this case as defined by the ordinance and shown by the record is nothing less than a concurrent exercise of fundamental rights of freedom of speech, press and assembly.

Under the decisions of this Court the act of picketing has been specifically held to be such an exercise of civil liberties; its motive and purpose has been established by Federal public policy approved by this Court; and in any event, picketing comes within the general definition of this Court as an expression of opinion for lawful purposes.

(1) Judicial decisions have specifically held that peaceful picketing is an exercise of civil liberties.

The recent *Leaflet Cases* involved four different city ordinances. (*Schneider v. New Jersey* and three other cases, 60 Sup. Ct. 146, 308 U. S. —). The ordinance of the City of Milwaukee prohibiting leaflet distributions was applied to a picket.

> "The petitioner who was acting as a picket stood in the street in front of a meat market and distributed to passing pedestrians, handbills which pertained to a labor dispute of the meat market, set forth the position of organized labor with respect to

the market and asked citizens to refrain from patronizing it" (60 Sup. Ct. at p. 148).

The ordinance was declared invalid and the conviction reversed because it abridged the "liberty of free speech."

In the case of *Senn v. Tile Layers Protective Union*, 301 U. S. 468-478, this Court said:

> "Members of a union might, without special statutory authorization by a State make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."

In the case of *Hague v. CIO*, 307 U. S. 496, this Court enjoined the enforcement of three ordinances of the City of Jersey City under which Mayor Hague banned unions and their organizers and members during labor disputes and in the course of organizing activities from distributing leaflets, holding meetings and carrying placards or making public announcements on the streets of Jersey City. The record in that case, and the opinion of the courts below (25 F. Supp. 127 and 101 F. (2d) 774, substantially upheld by this Court) make it clear that the civil liberties protected by the injunction included peaceful picketing carried on by workers in the same circumstances as did the appellant in the case at bar. See, *Hague v. CIO*, Record on Appeal 1938, No. 651, pp. 767-8, 772, 1289, 1304-5.

The express recognition of the fact that picketing is an exercise of fundamental civil liberties has also been set forth in two recent decisions by highest State courts.

People v. Harris 104 Colo. 386, 91 P. (2d) 989;

Reno v. Second Judicial District Court (Nev.), 95 P. (2d) 994.

In both cases ordinances prohibiting picketing were declared invalid under the Federal guarantees. In the *Reno* case, the Nevada Supreme Court said:

> "The Colorado case (*People v. Harris*) is squarely in point and is buttressed with ample authority. It reflects the modern view that peaceful picketing is lawful and is immune from legislative interdiction by reason of constitutional guarantees" (95 P. (2d) at p. 1003).

(2) Peaceful picketing has been specifically affirmed by public policy and approved by this Court.

Peaceful picketing, in its motives and purposes, has been specifically established by the public policy of the United States embodied in the National Labor Relations Act which has been sustained by this Court as affirming fundamental rights. *NLRB v. Jones & Laughlin*, 301 U. S. 1, 33.

Section 7 of the National Labor Relations Act provides that (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. Sec. 157):

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Clearly the use of leaflets, the spoken word and meetings are necessary incidents to the exercise of the right of collective bargaining and are directly embraced within the meaning of the phrase "concerted activities for mutual aid and protection."

In the case of *Williams Coal Company, et al.*, 11 NLRB 579, 646, the National Labor Relations Board specifically held that peaceful picketing was an exercise

of the right to "engage in concerted activities for mutual aid and protection" as guaranteed by Section 7 of the Act.

It would thus seem to be clear that the acts of the defendant were an exercise of a privilege and immunity of Federal citizenship and a fundamental right.*

The act of picketing is likewise expressly favored by the public policy of the United States as established in the Norris-LaGuardia Anti-Injunction Act (Act of March 23, 1932, c. 90; 47 Stat. 70; 29 U. S. C., Sec. 101 et seq.)

The Federal Social Security Act refuses the grant of Federal subsidies to the administration of a state unemployment insurance law which would require workers to take work:

> "If the position offered is vacant due directly to a strike, lockout, or other labor dispute.
>
> "If as a condition of being employed the individual would be required to join a company union or resign from or refrain from joining any bona fide labor organization."
>
> (Int. Rev. Code as amended, Subchapter C, Sec. 1603 (a) (5) (A) (C) Act of Aug. 10, 1939, c. 666.)

Not only has the Federal law recognized the right to collective bargaining but California state law has done so likewise. Section 923 of the Labor Code of the State

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* In this case, it was not questioned upon the trial that the appellant was exercising rights guaranteed by the National Labor Relations Act. The Delta Tunnel project was for the purpose of relocating the main track of the Southern Pacific Railroad under a contract with the United States Bureau of Reclamation. (R. 34-35) Charges were filed with the National Labor Relations Board. (R. 42 Defendant's exhibits 1 and 2, R. 69-71). Sometime after this case was tried in the Justice's Court, the charges were dismissed by the National Labor Relations Board for lack of jurisdiction. In any event, the ordinance on its face applies to "any works, factory or place of business or employment" in Shasta County, whether or not it is subject to the National Labor Relations Act. Cf. opinions in *Hague v. CIO*, supra.

of California provides that workers shall have the right to bargain collectively and other concerted action for their mutual aid and protection.

This Court, before these laws were passed, recognized the imperative legality of concerted action for mutual aid and protection taken by workers, of which picketing is a necessary incident.

> *Amalgamated Utility Workers v. Consolidated Edison Co.* et al. (decided this term, 308 U. S. —)
>
> *American Foundries v. Tri-City Council*, 257 U. S. 184.

See, Magruder, *A Half Century of Legal Influence Upon the Development of Collective Bargaining.* (1937) 50 Harv. L. Rev. 1071.

(3) The act of picketing comes within the general definitions of freedom of expression.

The right to picket is included within the general definition of the term "liberty of expression" as laid down by this Court.

This Court has defined freedom of speech and press to embrace the right to

> "speak, write or circulate information or opinion." (*Leaflet Cases*, 60 Sup. Ct. p. 150)
>
> To the same effect see *Hague v. CIO*, 307 U. S. 496, 525; *Lovell v. City of Griffin*, 303 U. S. 444, 452.

The variety of situations embraced by the general concept of freedom of expression is illustrated by the *Leaflet Cases* which protected the following:

1. A picket in front of a meat market during the course of a labor dispute urging passersby not to patronize it.

2. A member of a religious sect handing out tracts of the society.
3. A person distributing notices of a protest meeting in connection with the administration of the state unemployment insurance.
4. A person distributing notices of a meeting to be held under the auspices of the Friends of Lincoln Brigade at which speakers would discuss the War in Spain.

There can be no question that the carrying of banners or signs is a form of liberty of expression. One of the ordinances in the Hague case declared invalid by this Court, like the Shasta County ordinances, forbade the carrying on any sidewalk or roadway, of any placard, banner or sign.

In the case of *Stromberg v. California*, 283 U. S. 359, the act of the appellant was that of raising a red flag. The display of the flag was treated as a form of freedom of speech and the California statute prohibiting such a display as a "sign, symbol, emblem or opposition to organized government" was held unconstitutional as a denial of freedom of speech.

Thus it is apparent that the act of the appellant is an exercise of freedom of speech, press and assembly. It is unnecessary to attempt to distinguish between the rights, since each of them is equally important and no one can be abridged any more than the other.

It is settled beyond dispute that the Fourteenth Amendment, and particularly Section One thereof, protect the exercise of these rights against any invasion, abridgment or unreasonable and arbitrary regulation by the states.

Leaflet Cases, 60 Sup. Ct. 146.
Hague v. CIO, 307 U. S. 496.

Lovell v. City of Griffin, 303 U. S. 444.
Herndon v. Lowry, 301 U. S. 242.
DeJonge v. Oregon, 299 U. S. 353
Grosjean v. American Press Company, 297 U. S. 233.
Stromberg v. California, 283 U. S. 359.
Whitney v. California, 274 U. S. 357.
Gitlow v. New York, 268 U. S. 652.

It is equally well established that the ordinance of Shasta County is state action within the meaning of the Fourteenth Amendment.

Leaflet Cases, supra.
Lovell v. City of Griffin, supra.

II. THE ORDINANCE ON ITS FACE AND AS CONSTRUED AND APPLIED ABRIDGES FUNDAMENTAL CIVIL LIBERTIES.

A. The ordinance makes picketing in whatever manner it is carried on unlawful and subject to criminal procedures and penalties.

It is obvious that the ordinance on its face and as construed and applied prohibits all picketing. The prosecution's witness testified that the men were arrested about an hour and a half after they first started to picket.

> "At approximately 7:30 a. m. . . . a group of 29 men . . . started picketing . . . At approximately ten minutes to nine, Sheriff Sublett of Shasta County arrived with some deputies and proceeded to place all of the pickets, including John Carlson, under arrest for picketing in violation of the ordinance." R. 23)

The minute entries of the Justice's court shows that the appellant was in jail for seven days before he was

released on his own recognizances. Three of his co-workers spent 19 days in jail. In addition, the local authorities resorted to indictments under criminal conspiracy provisions of the California Penal Code which is punishable as a felony by imprisonment in penitentiary. (Deering, Cal. Penal Code [1937] Secs. 17, 182) And this threat was sufficient to stop all picketing and cause the union to lose the strike.[1] John Morgan testified upon cross-examination:

> "Q. . . . Is it not true that the picketing was stopped by agreement between the union and the law enforcement agencies of Shasta County after a number of the union members had been indicted for a conspiracy to violate the ordinance in question?
>
> "A. . . . I would have to answer yes on second-hand information, Mr. Carr. I was not a party to the agreement, but I understand that such was the case. In any event, when the county authorities indicted the union leaders for a felony, that is, conspiracy to violate the anti-picketing ordinance, why then it became impossible to continue the picket line because we could not ask the workers to subject themselves to being charged with a felony, which carries a penitentiary sentence on conviction, and therefore we were obliged to give up picketing altogether. And this was directly the cause of our losing the dispute with the employer, this fact of not being able to maintain the economic pressure on the employer which results from maintaining a peaceful picket line." (R. 57)

It is thus evident that the ordinance operates as a prohibition of all picketing, whether peaceful or not. This is surely a previous restraint upon the exercise of

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[1] Action on the conspiracy indictments has been suspended pending the outcome of this case. One of the attorneys for the men, Richard Gladstein, was among those so indicted and also charged with violating the ordinance.

freedom of expression since it attempts to meet any abuse of the right by forbidding in advance even its lawful exercise.

Neat v. Minnesota, 283 U. S. 697.
Lovell v. City of Griffin, supra.
Chafee, *Freedom of Speech*.

B. No substantial reasons can be advanced to support the validity of the ordinance.

This Court has established the tests for reasonable limitations that may be imposed through legislation upon the exercise of freedom of speech, press or assembly. Such limitations can prohibit only those expressions of word or speech or assembles which are:

(a) Inconsistent with the maintenance of general comfort and convenience or the public peace.

(b) Obscene or offensive to public morals or advocate unlawful conduct.

A mere legislative declaration of policy or legalistic argument that certain restrictions upon civil liberties are justified under either of these tests does not suffice. This Court, in the recent *Leaflet Cases*, supra, set forth the cardinal principle that any valid regulation of civil liberties must be supported by substantial reasons.

> "This Court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of the Court, the importance of preventing the restrictions of enjoyment of these liberties.
>
> "In every case, therefore, where legislative abridgment of the rights is asserted, the courts

should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise or rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights." (60 Sup. Ct. pp. 150-151.)

No substantial reasons have been or can be offered in support of the absolute prohibition of the Shasta County anti-picketing ordinance against peaceful picketing by workers engaged in the pursuit of collective bargaining.

(1) The ordinance unlawfully prohibits peaceful picketing which in no manner can be held to be inconsistent with the maintenance of general comfort and convenience or the preservation of the public peace.

The basic governing principle underlying the validity of any regulation of freedom of expression has been established by this court:

> "Although a municipality may enact regulations in the interest of public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the constitution to those who wish to speak, write, print or circulate information or opinion." (*Leaflet Cases*, 60 Sup. Ct. 150.)

This ordinance, insofar as it attempts to regulate the manner of picketing, is an attempt to restrict the use of the streets and public places in Shasta County for picketing.

If we examine the three great contemporary opinions of this Court we shall see that this ordinance violates every one of the specific requirements laid down by this Court for a reasonable regulation of the use of the streets as a place for the exercise of fundamental civil liberties. These decisions establish, first, that the public streets and parks are lawful places for the exercise of civil liberties.

> "The streets are a natural and proper place for the dissemination of information and opinion." (*Leaflet Cases*, 60 Sup. Ct. 151)
>
> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens." (*Hague v. CIO*, 307 U. S. at p. 515)

These decisions establish, second, that all of the streets and public places must be open and the local authorities may not cut off the right to exercise it in some places on the excuse that it may be exercised elsewhere. Thus it said in the *Leaflet Cases*:

> "It is suggested that the Los Angeles and Worcester ordinances are valid because their operation is limited to streets and alleys and leaves persons free to distribute printed matter in other public places. But, as we have said, the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." (60 Sup. Ct. at pp. 151-152)

In the same case the ordinance of the Town of Irvington attempted to prohibit the distribution of leaflets from house to house. The court struck down this restriction, saying:

> "perhaps the most effective way of bringing them [pamphlets] to the notice of individuals is their distribution at the homes of the people." (*Leaflet Cases*, 60 Sup. Ct. at p. 152)

Hence it is clear that the attempt of the Shasta County ordinance to prohibit picketing on public streets *only* in or near the employer's place of business is invalid.

These decisions establish, third, that the ordinance may not prohibit the peaceful exercise of civil liberties on the public streets as a means of maintaining general comfort and convenience or preserving public order. Thus it said in the *Lovell* case:

> "The ordinance is comprehensive with respect to the method of distribution. It covers every sort of circulation 'either by hand or otherwise.' There is this no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets. The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager." (303 U. S. at p. 451)

In the *Leaflet Cases*, an attempt was made to justify the prohibitions on the ground that they were necessary in order to prevent littering of the streets. But said the Court:

> "We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient

to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets." (60 Sup. Ct. at p. 151)

In the *Hague* case the argument was made that the Hague ordinance prohibiting street meetings was necessary in order to prevent breaches of peace. But said the Court:

"We think the court below was right in holding the ordinance quoted in Note 1 void upon its face. It does not make comfort or convenience in the use of streets or parks the standard of official action. It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent 'riots, disturbances and disorderly assemblage.' It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs for the prohibition of all speaking will undoubtedly 'prevent' such eventualities. But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right." (307 U. S. at p. 514)

In the light of this requirement, the Shasta County ordinance must be deemed unconstitutional insofar as it attempts to prohibit peaceful picketing simply because its declaration alleges that picketing

"will thereby agitate the peace of mind of the people of the County of Shasta, and will foment resistance to said union activities, and will bring about a con-

> dition of open physical violence and a state of riot and uncontrollable mob action which will endanger the lives, health, property, comfort and peace of mind of all the people and citizens of the County of Shasta." (Ex. A. R. 64A)

Nor can the mere terminology of the ordinance that picketing is

> "for the purpose of intimidating, threatening, or coercing or attempting to intimidate, threaten or coerce."

make all such picketing in fact intimidating, threatening or coercing.

It is impossible to distinguish the ordinances which were declared invalid in the three recent cases from the ordinance in this case. The ingenuous argument of the District Attorney that the ordinance does not forbid persons from distributing leaflets in front of the place of business, but merely prevents picketing, will not suffice.

The fact is, as demonstrated by the record herein, that it was necessary for the appellant and his fellow workers to bear signs in view of the circumstances. The picketing was being conducted upon a highway with automobiles whizzing by so that it would have been impossible to hand out leaflets to passersby. Moreover, the men coming to and from work and on the job would see a sign where they might not take a leaflet or hold on to it after they had gotten inside of the Project.

The ordinance cannot, therefore, be justified as a reasonable regulation of the manner of exercising fundamental civil liberties.

(2) The ordinance unlawfully prohibits peaceful picketing which in no manner can be held to be obscene or offensive to public morals or advocating unlawful conduct.

The question which we now raise is whether the Shasta County authorities may constitutionally determine in the exercise of their legislative power that picketing is a form of expression that must be condemned because of the unlawful nature of the purposes or objects which it expresses. We believe that the answer to this question depends upon the application of two tests:

(a) whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about substantial evils which the county has a right to prevent.

(b) whether the words used constitute a malicious and willful interference without any legal justification with the rights of private individuals.

The ordinance in its declaration of policy seeks to describe certain substantive evils which the nature of picketing allegedly brings about. The declaration of policy states that picketing will "agitate the peace of mind of the people of Shasta County" and "foment resistance" bringing about a condition of public disorder.

Under the terms of the ordinance, there are three purposes for which peaceful picketing is forbidden: (1) to influence or induce persons to quit work or refrain from taking a job, (2) to influence or induce persons to refrain from purchasing or using goods manufactured by the company, and (3) to threaten, intimidate or coerce anyone who is working or seeking to obtain work.

The complaint in this case alleged that the appellant violated Section 2 of the ordinance. The evidence in the case went to all parts of the ordinance. It follows, therefore, that if any one of the purposes which the

ordinance on its face condemns is lawful, or if the purpose of the picketing as shown by the evidence was lawful, then the ordinance on its face and as construed and applied in this case must be declared invalid.

Herndon v. Lowry, supra.
DeJonge v. Oregon, supra.
Stromberg v. California, supra.
Whitney v. California, supra.
Fiske v. Kansas, 274 U. S. 380.

(a) Publicizing the facts of a labor dispute does not advocate any unlawful means nor does it involve any clear and present danger of bringing about a substantive evil.

We have argued in a previous portion of this brief that peaceful picketing in pursuit of the right to collective bargaining is a lawful activity. On the basis of this contention we submit that publicizing the facts of a labor dispute through peaceful picketing can in nowise be held to involve any clear and present danger of bringing about a substantive evil that Shasta County had a right to prevent.

The standard required by this Court was laid down by Mr. Justice Holmes in the Schenck case:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has the right to prevent. It is a question of proximity and degree." (*Schenck v. United States*, 249 U. S. 47, 52)

This standard was reaffirmed by this Court in the *Herndon* and *DeJonge* cases.

Herndon v. Lowry, 301 U. S. 242, 257.
DeJonge v. Oregon, 299 U. S. 353, 365.

The eloquent elaboration of this safeguard of constitutional liberties was made by Mr. Justice Brandeis in his concurring opinion in the *Whitney* case, supra. He wrote:

> "That it is hazardous to discourage thought, hope and imagination, that fear breeds repression, that repression breeds hate, that hate menaces a stable government, that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones.
>
> * * *
>
> It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing there was no emergency justifying it.
>
> * * *
>
> Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society.
>
> * * *
>
> The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the state.
>
> * * *
>
> The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the state merely creates a rebuttable presumption that these conditions have been satisfied."
>
> (274 U. S. 375, 377, 378, 379)

On its face, this ordinance fails to meet this standard. It is simply unreasonable and arbitrary to suppose that the use of picketing to induce men to quit work could directly result in a serious injury to the State. It is equally unreasonable and arbitrary to declare that the

aim of unions to enroll members in Shasta County is a substantive evil which the county may prevent.

The ordinance gives itself away when it declares that picketing will foment resistance and bring about a condition of physical violence and mob action. The danger to the state arises not from the picket line but from the vigilantes who would suppress the picket line by force and violence. To forfend this danger, the law of Shasta County steps in to stop, not the lawless vigilante mob, but the peaceful pickets.

But if we were for a moment to accept the ordinance on its face, the conviction of the appellant upon the facts will not stand the light of Brandeis' opinion in the Whitney case. The legislative declaration and the opinion of the State court sustaining it is only a rebuttable presumption. The appellant's challenge on the record shows that none of the conditions invoked by the legislature have in fact been satisfied. At every point, on every issue, the presumption of the ordinance is rebutted by undisputed evidence.

The workers who joined the nationally affiliated union were not "satisfied with their employment." They joined the union freely of their own free will.

They were not "required to go on strike" to meet "the dictates of the union." They were locked out by the employer because they chose their own union.

They decided to picket as their only means of expressing their side of the dispute with their employer.

The picketing was entirely peaceful. No one was coerced, put in fear, no act of violence or threat of violence was committed.

We will not concede for the purpose of argument that even if a serious danger of a state of riot and uncontrol-

lable mob violence arising from resistance to the union were shown, it would be any justification. It was the duty of the city to clean up the streets or arrest those who dropped the leaflets and not the leaflet distributors in the Leaflet Cases. It was the duty of Mayor Hague to suppress any disorder that might occur at CIO meetings in Jersey City, and not the meetings. It is the duty of Shasta County officials to control mob violence, not to suppress picketing. If they will not, they are guilty of a federal crime., *Civil Rights Statutes,* Act of Mar. 1, 1875, c. 114, Sec. 3, 18 Stat. 336, 8 U. S. C. Sec. 45.

In the case of *Near v. Minnesota,* 283 U. S. 697, the statute sought to suppress any publication of scandalous and defamatory matters. The newspaper publisher convicted under it had indulged in the most vicious kind of attacks on law-abiding citizens of the community. It was argued that the conviction was justified because his attacks were so false and vicious they incited his victims to violence. But said this Court:

> "If this consideration warranted legislative interference with the initial freedom of publication, the constitutional protection would be reduced to a mere form of words." (p. 722)

Indeed, one of the reasons why the Union of which Carlson was a member carried on picketing was to prevent the rise of hostile public opinion that would lead to violence against the Union members. So Morgan testified:

> "As a matter of fact, I would say that not only is it important to win over the opinion and sympathy of the working man generally, but also the opinion and sympathy of the businessman and the general citizenry in the county. We know from experience that where unions are unable to impress

the justice of their case on the community at large, and in some cases where employers have whipped up hysteria through falsifying the issues, that union men have been very badly treated through the formation of so-called 'citizens' groups' and back-to-work movements, and even in some cases vigilante movements. In the United Concrete situation we felt that public opinion was a very important factor on the question of whether or not we would win." (R. 51)

The issues in this case can be put in terms of this statement by Morgan and the declaration of policy in the ordinance. Which is the way to solve conflicts in society—by suppression of civil liberties or by free exercise of them. We think the "path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies."

The authorities of Shasta County have expressed their "fears" and chosen the "path of repression."

Even if there were no chance that the Union could persuade anyone in Shasta County to its side, then we must remember the dissenting caution of Mr. Justice Holmes in the *Abrams* case:

> "We should be eternally vigilant against the attempts to check the expressions of opinion that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." (250 U. S. at p. 630)

The standard required by this Court to justify a curb on ideas was relaxed during the last World War. In the case of *Gitlow v. New York*, 268 U. S. 652, over the vehement dissent of Justices Holmes and Brandeis,

this Court sustained a conviction for the mere advocacy of resistance to war by unlawful means. It said:

> "Utterances advocating the overthrow of organized government by force, violence and unlawful means are so inimical to general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power." (p. 669)

In each of the other Espionage cases arising out of the 1917 Act, this Court found that there was at least an advocacy of unlawful means.

Abrams v. United States, 250 U. S. 616.
Schaeffer v. United States, 251 U. S. 466.
Pierce v. United States, 252 U. S. 239.
Chafee, *Freedom of Speech*.

And similarly in the case of the California Anti-Syndicalism law. *Whitney v. California*, 274 U. S. 352.

But the Shasta County ordinance does not require that pickets by their conduct or demeanor must urge force and violence or other unlawful means. Mere persuasion for the purpose of "influencing or inducing" is sufficient to make picketing unlawful.

(b) Publicizing the facts of a labor dispute is not a malicious and willful interference with the rights of others without any legal justification.

It may be argued here, as the ordinance itself implies, that picketing must be prohibited as an unlawful interference with the rights or employers and workers who have not joined the cause of the Union. This is to say that the authority of the state is wrapped about the private interests of these parties to a labor dispute, to strike down the exercise of civil liberties by the Union. We are met at the threshold of this supposed justifica-

tion of the ordinance by the words of Mr. Justice Brandeis:

> "The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State."
>
> (*Whitney v. California*, 274 U. S. at p. 378)

However, reference may be made to the cases in which this Court has sustained prohibitions in whole or in part against the union's publicity of the facts of a labor dispute.

Loewe v. Lawlor, 208 U. S. 274.
Gompers v. Bucks Stove, 221 U. S. 418.
Duplex Printing Press v. Deering, 254 U. S. 443.
American Foundries v. Tri-Cities Council, 257 U. S. 184.
Bedford Stone Co. v. Journeymen and Stone Cutters Association, 274 U. S. 37.
Dorchy v. Kansas, 272 U. S. 306.

But these cases are to be distinguished upon three grounds.

First. They are each, except for the *Dorchy* case, injunction cases involving a conflict of the private rights between employer on the one hand and the union on the other hand. The Court considered the issues in each case, weighing the conflict of interests involved, and then laid down prohibitions upon the future conduct of the union and imposed damages for the injuries which it inflicted in the past.

Thus in the *Tri-Cities case*, the use of two pickets at each factory gate was held to be reasonable under the circumstances. The Court emphasized the fact that:

> "each case must turn on its own circumstances."

The Shasta County ordinance prohibits all picketing under all circumstances. Its arbitrary fiat loses the possible validity which the particular facts in the injunction cases may give to the general language of the opinions in those cases.

Second. In four of the cases, the Court found that the union was engaged in unlawful purposes, namely, a restraint of trade and a boycott of the employers' goods in interstate commerce. Consequently, whatever means it used was for an unlawful purpose.

So in the *Duplex* case, the Court said:

> "It is settled by these decisions that such a restraint produced by peaceable persuasion is as much within the prohibition (of the antitrust laws) as one accompanied by force or threats of force." (254 U. S. at pp. 467-468)

In the case at bar, no question of so-called "secondary boycotts" is involved.

See, *Secondary Boycotts in Labor Disputes* (1938) 6 U. J. A. Bull. 83.

Third. Each of these cases and the whole host of judicial precedents that may be arrayed to support curbs upon picketing must be distinguished upon the ground that in them the Court found that the union had no justifiable interest to support its interference with the employer's business.

Thus in the *Gompers* case, the Court said:

> "But we will not enter upon a discussion of the constitutional question raised, for the general provision of the injunction did not in terms restrain any form of publication. The defendant's attack on this part of the injunction raises no question as to an abridgment of free speech, but involves the

power of a court of equity to enjoin the defendants from continuing a boycott which, by words and signals, printed or spoken, caused or threatened irreparable damage." (221 U. S. at pp. 436-437)

And in the case of *Dorchy v. Kansas*, it was held that a strike

> ". . . to collect a stale claim due to a fellow member of the union who was formerly employed is not a permissible purpose." (272 U. S. at p. 311)

The dictum of Mr. Justice Brandeis in that case is frequently cited: (p. 311)

> "Neither the common law nor the Fourteenth Amendment confers the absolute right to strike. Compare, *Aikens v. Wisconsin*, 195 U. S. 194, 204-5"

We do not suppose that any right in society is absolute. The reference by Mr. Justice Brandeis to the *Aikens* case makes it clear that his dictum meant simply that a malicious and willful exercise of a right unsupported by any justifiable interest can be made unlawful.

But we submit that it is now fundamentally recognized that workers do have a legal interest in terms and conditions of employment and representation for purposes of collective bargaining to justify their exercise of constitutional rights. Surely in this case the appellant and his fellow workers, who were locked out after they freely joined a union with which the employer refused to deal, have an interest in the job which justifies their picketing.

This contemporary development which makes inapplicable the previous decisions is perhaps best stated in the opinion of this Court in the case of *New Negro Alliance v. Sanitary Grocery*, 303 U. S. 552. There this

Court sustained the picketing by members of the Negro race against a store which refused to employ Negroes on the ground that the dispute came within the terms of the Norris-LaGuardia Act. It said:

> "It was intended that peaceful and orderly dissemination of information by those defined as persons interested in a labor dispute concerning terms and conditions of employment in an industry or plant or a place of business should be lawful; that, short of fraud, breach of the peace, violence, or conduct otherwise unlawful, those having a direct or indirect interest in such terms and conditions of employment should be at liberty to advertise and disseminate facts and information with respect to terms and conditions of employment, and peacefully to persuade others to concur in their views respecting an employer's practices." (pp. 562-563)

It is significant to note that the House report on the Norris-LaGuardia Act specifically referred to the limitations on picketing imposed in the *Tri-Cities* case as being "responsible in part for the agitation for the passage of the law."

> "In the case of the *American Steel Foundries v. Tri-City Central Trades Council, supra,* there was a strike, and, of course, a picket line. There was practically no fraud or violence, but the persistent giving of publicity to the facts involved in the dispute and the persistent advising of other persons without fraud or violence not to work for the employer. It was thought by the labor union that Section 20 (Clayton Act) prohibited an injunction against such acts, but the Supreme Court held that such acts could be enjoined and, therefore, the legislation proposed specifically restricts the courts in this respect unless 'the acts are accompanied by fraud or violence.'" (The House Report, No. 669, 72d Cong. 1st Sess.)

In the Senate report it was stated:

> "The first knowledge which the defendant has is service of notice upon him that the restraining order has already been issued. Before he is given an opportunity to be heard, he is enjoined, and in many cases, he is restrained from doing acts and things which seriously interfere with and sometimes completely deny, his fundamental right of liberty of action, which belongs to every free citizen. That there have been abuses of judicial power in granting injunctions is hardly open to discussion." (The Senate Report, No. 163, 72d Cong. 1st Sess.)

This ordinance can be declared valid as a protection of the rights of others against picketing only upon the ground that the exercise of fundamental civil liberties by workers is illegal because it results in an injury to the employer's property and business.

But this Court has said of these fundamental civil liberties:

> "This Court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this Court, the importance of preventing the restriction of enjoyment of these liberties." (*Leaflet Cases*, 60 Sup. Ct. at pp. 150-151)

To declare this ordinance valid would make a mockery of these rights.

C. The ordinance is invalid because it is altogether vague and indefinite.

This Court has frequently stricken down laws restricting the exercise of civil liberties on the ground that

they are vague and indefinite. When it does so it is because the statute in question prohibits the exercise of constitutional rights in a peaceful manner for lawful purposes as well as the unlawful exercise of those rights for unlawful purposes.

Fiske v. Kansas, supra.
Herndon v. Lowry, supra.
DeJonge v. Oregon, supra.
Stromberg v. Carlson, supra.

Thus in the *Herndon* case, the Court said: (p. 259)

> "Where a statute is so vague and uncertain as to make criminal an utterance or an act which may be innocently said or done with no intent to induce resort to violence, or, on the other hand, may be said or done with a purpose violently to subvert government, a conviction under such a law cannot be sustained."

It is not necessary to consider whether any part of this ordinance is inseparable from the rest because no part of it is free of this taint of illegality.

The prohibition against making loud or unusual noises, and against loitering are completely vague and indefinite, and arbitrary in their fiat.

Territory v. Anduha, 48 F. (2d) 171.

In the *Anduha* case the Court declared invalid an ordinance of the Hawaiian government making it a criminal offense to loiter or idle upon any public street or highway on the ground that it was vague and arbitrary.

The portions of the ordinance which prohibit picketing for the purpose of intimidating, threatening or co-

ercing are equally vague and indefinite. In English labor history, at the turn of the century the House of Lords decided the case of *Quinn v. Leatham* [1901] A. C. 495. There a union threatened a strike against a customer of an employer who refused to hire union men. The English court, in its opinion, condemned by blanket decree all "intimidation, molestation, and obstruction." The consequences of this decision are ably set forth in the learned article by Rothschild, *Government Regulation of Trade Unions in Great Britain*, 38 Col. L. Rev. 1, 1336. Lord Haldane, who had himself argued the case for the employer, stated:

> "I will defy the Attorney General or any other lawyer to tell what the position of those who have to conduct a strike is at the present time. The effect of this judgment . . . has been to make it an impossibility to conduct a peaceable strike in a legal fashion." (108 Parl. Deb. 4th Ser. 1902, 320.)

The Attorney General, Sir John Walton, said of this ban:

> "A scope has been given to the law of conspiracy so loose and so wide that it is impossible to indicate beforehand what may be the legal character of the conduct of these organizations, and which is determined by the ex post facto decision of a legal tribunal . . . . you have an interference with the policy of these unions carried out by themselves with a view to advancing their own interests because judicial opinion considered that the advancement of those interests is unfavorable to the interests of the community. . . . If the law remained as it was now . . . there was absolutely no test in Heaven and earth, except the opinion of the particular person who was asked to determine whether the object of the combination was lawful or unlawful." (154 Parl. Deb. 4th Ser. 1906, 1295, 1300; 162 Parl. Deb. 4th Ser. 1906, 156.) (See Rothschild, op. cit. *supra*, p. 1339.)

The challenge of these great lawyers is present in the case at bar; just what are the things that workers in a union during a labor dispute may or may not do under the Shasta County Anti-Picketing law.

The force and effect of this Court's decisions in the *Herndon* and *DeJonge* cases cannot be avoided. In unmistakable language, this Court stated (we quote from the *Herndon* case):

> "The statute as construed and applied amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect on the future conduct of others. No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment" (301 U. S. pp. 263-264).

The Shasta County Anti-Picketing ordinance is a dragnet which may enmesh anyone who agitates for a change in employer-employee relations if a court or jury can be persuaded that he ought to have foreseen that his conduct would have some effect on the future conduct of others and cause them to think themselves intimidated, coerced or threatened.

The Shasta County ordinance does not define what intimidation, coercion, or threats may be except to say that the act of picketing in itself has such an effect.

It is by now clear that the unlawfulness of any threat depends upon what is being threatened and that phrases such as "intimidation" or "coercion" are mere question-begging epithets. *Levering & Garrigues v. Morrin*, 71 F. (2d) 274 cert. den. 293 U. S. 595.

As Mr. Justice Holmes said in the case of *Vegelahn v. Guntner*, 167 Mass. 92, 107, 44 N. E. 1077, 1085.

> "As a general rule, even if subject to some exception, what you may do in a certain event you may threaten to do—that is, give warning of your intention to do in that event, and thus allow the other person the chance of avoiding the consequence."

The English Lord Scrutton in the case of *Wade & DeFreville Ltd. v. Motor Trade Assn.* (1921), 3 K. B. 40, at p. 69, confirmed this opinion when he said:

> "I respectfully concur on this point with the admirable judgment of Holmes, J., in *Vegelahn v. Guntner* where he remarks that the unlawfulness of 'threats' depends on what you 'threaten' and of 'compulsion' on how you 'compel' . . . . the discussion of this question would be much more lucid if the disputants would observe certain simple rules. First, to avoid question-begging epithets, such as 'boycotting,' 'ostracism' . . . 'coercion' and the like. Secondly, when they use the word 'maliciously' to say in what sense they use it."

It may be that the decisions in the old injunction cases can be supported upon one ground—an injunction case brings before a court a specific situation and it may be said the Court's decree weighs the conflicting interests and then lays down the limits for future allowable activity by the union. But a criminal statute which seeks to embody the general language of a particular case as a blanket prohibition in all cases loses the particularity that may save the decision and becomes an arbitrary and vague command under which workers must act at their peril.

Like the statutes in the *Herndon* case, in the *DeJonge* case, and the ordinances in the *Hague* and *Leaflet* cases,

the Shasta County Anti-Picketing ordinance must fall as altogether vague and indefinite, providing no ascertainable standard of lawful and unlawful conduct.

D. The Ordinance Denies Equal Protection of the Laws.

The uncontradicted testimony in this case shows that the employer in the case had complete and free access to all available means of communication and expression of opinion on controversial issues between himself and the Union. (R. 58)

The Union on the other hand did not have the funds to advertise in the newspaper or to get radio time and in fact no public hall was available even if it had funds. (R. 59)

In addition to the evidence in this particular case, the ordinance on its face manifestly applies only to workers.

There is nothing in the ordinance nor is there any other law in Shasta County or California which in any way restricts or abridges the employer's freedom of speech with respect to the mere dissemination of information concerning a labor dispute.

We do not see how it is possible to evade the objection that this law therefore is nothing short of a crass and gross piece of discrimination in denying to workers on strike the ordinary rights enjoyed by the employer.

Yick Wo v. Hopkins, 118 U. S. 356.

Ex Parte Lerner, 281 Mo. 18, 218 S. W. 33.

III. CONCLUSION

It is respectfully submitted that peaceful picketing in public streets and places during a labor dispute over terms and conditions of employment and representation for purposes of collective bargaining is an exercise of fundamental civil liberties protected by the Federal Constitution; that the Shasta County Anti-Picketing ordinance on its face and as construed and applied abridges the exercise of these liberties; and that a decree should be entered declaring the ordinance invalid and reversing the judgment below.

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